United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7222

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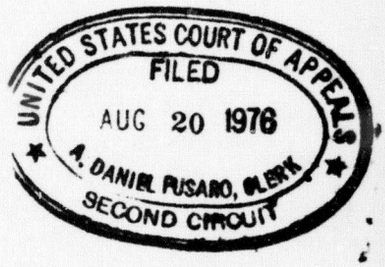
FOR THE SECOND CIRCUIT



In the Matter of

GRAND BAHAMA PETROLEUM COMPANY, LIMITED,

Petitioner-Appellee,

-against-

ASIATIC PETROLEUM CORPORATION,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR RESPONDENT-APPELLANT ASIATIC PETROLEUM CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous Authorities

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Preliminary Statement

Respondent-Appellant, Asiatic Petroleum Corporation ("Asiatic"), submits this brief in reply to the answering brief of Petitioner-Appellee, Grand Bahama Petroleum Company, Limited ("Grand Bahama"). At the outset, it must be emphasized that this is a limited appeal pursuant to 28 U.S.C. § 1292(b) raising only the question certified by the District Court and accepted by this Court.

Grand Bahama's lengthy recitation of its version

of the underlying dispute (Grand Bahama's Brief ("G.B. Br."), 4-18) and its resort here to an argument which it did not even make in the District Court or on the 1292(b) application to this Court, are simply diversionary tactics designed to focus attention away from the one question which is in fact before the Court, to wit:

> May an action to compel arbitration pursuant to the Federal Arbitration Act (9 U.S.C. § 4) be maintained in a United States District Court sitting in New York, by a nonqualified foreign corporation doing business in New York, where the District Court's jurisdiction is founded solely upon an alleged diversity of citizenship and where the strong public policy of New York State, as embodied in § 1312 of its Business Corporation Law ("BCL"), prohibits the maintenance of such an action in the New York State courts, unless and until that corporation qualifies?

Statement

The manifest error of Grand Bahama's arguments can best be recognized if we first present a brief summary of Asiatic's position with respect to the question set forth above.

A. This is a diversity case. Grand Bahama commenced this action in the District Court alleging "diversity of citizenship" as its sole basis for jurisdiction (Joint Appendix ("App."), 3a, ¶ 3). Moreover, Grand Bahama conceded in both the District Court and on the 1292(b) application to this Court that this action was based solely on diversity of citizenship. For the first time on this appeal, however,

Grand Bahama urges that this could be a federal question case arising under 9 U.S.C. § 200 et seq. (the Convention of 1958). Further, Grand Bahama erroneously reasons that if this is a federal question case, then BCL § 1312 cannot possibly be applicable.

Grand Bahama's suggestion that the District Court did not reach the question of whether or not the Convention applied and thus, whether or not this is a federal question case (G.B. Br. 3), must have been made with "tongue in cheek". The reason the District Court did not reach the question was because Grand Bahama did not present it.

As will be discussed herein, had this question been argued below, the District Court no doubt would have found that the Convention was not applicable here, but in any event, the presence or absence of a federal question and the relation of BCL § 1312 to such a question is an issue which the District Court should examine prior to appellate review, especially on a limited 1292(b) appeal.

2. Had this action been commenced in the New York State courts, it would be dismissed for failure to comply with New York BCL § 1312. BCL § 1312 expresses a strong and long-standing public policy of New York State (Asiatic's main brief ("As. Br."), 7). Door-closing statutes of this type have uniformly been found to be reasonable and constitutional

exercises of the police powers of the state (As. Br. 8-11). It is inconceivable to suggest, as Grand Bahama does, that New York State would not apply BCL § 1312 to this situation. Indeed, we know of no case (and Grand Bahama has cited no case) where a foreign corporation was found to be "doing business" in New York within the meaning of BCL § 1312 and yet a New York court refrained from applying that statute (As. Br. 8).*

C. In a diversity case, the federal court should reach the same result as the state court would reach. This is essentially the Erie doctrine and is a principal which is so well established that it needs no further comment here. Since a New York State court would dismiss the action at the outset (or dismiss it conditionally upon the foreign corporation's paying its taxes and qualifying to do business), the Erie doctrine requires a federal court, sitting in New York in a diversity case, to reach the same result (As. Br. 11-16).

D. The Federal Arbitration Act, which creates a body of federal substantive law, equally applicable in both federal and state courts, does not conflict with New York's public policy with respect to foreign corporations in any

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* As stated at page 5 of Asiatic's main brief, it must be assumed, for purposes of this appeal, that Grand Bahama is "doing business" in New York within the meaning of BCL § 1312 since the District Court cut off discovery and made no factual determination on this issue.

respect, and hence does not relieve the federal court from its obligation to apply state law on the issue of access to the courts. The substantive law created by the Federal Arbitration Act relates solely to the validity and interpretation of arbitration agreements. Asiatic has always conceded that federal substantive law would control any decision on issues relating to the underlying dispute on the merits between it and Grand Bahama. Thus, federal law (if any exists) would be applied to questions such as statute of limitations, statute of frauds, validity and interpretation of the agreement, etc.

But the question here does not involve the dispute on the merits, rather the question is one of access to the court itself. Since the Arbitration Act requires an independent basis for jurisdiction (i.e., diversity or a federal question), and since in this case that basis is diversity (App. 3a, ¶ 3), state law must control on the question of access to the court. Any other result would promote profuse forum shopping of the sort that Erie set out to prevent. Moreover, it would completely frustrate New York's public policy with respect to foreign corporations, allowing them to reap substantial benefits from doing business in New York State while at the same time avoiding their fair share of the tax burden. Surely, Congress did not intend such results when it promulgated the Arbitration Act.

Argument

POINT I

THE FEDERAL COURT SHOULD RESPECT THE STATE'S DOOR-CLOSING POLICY IN A DIVERSITY ACTION INVOLVING THE ARBITRATION ACT.

Grand Bahama has set forth several arguments in its brief in an attempt to avoid the impact of BCL § 1312. Treating these arguments seriatim will reveal that they are generally based on erroneous interpretations of the statutes and authorities cited, and as such, they cannot withstand even a cursory analysis.

A. Rule 17(b) of the Federal Rules of Civil Procedure mandates the application of BCL § 1312 to this case. Grand Bahama first argues that a failure to comply with BCL § 1312 deprives a foreign corporation of capacity to sue under New York State law, citing Hot Roll Mfg. Co. v. Cerone Equip. Co., 38 App. Div. 2d 339, 329 N.Y.S.2d 466 (3d Dep't 1972) (G.B. Br. 19). Grand Bahama then claims that Rule 17(b) of the Federal Rules of Civil Procedure requires application of the law of the place of incorporation on the issue of capacity, which in Grand Bahama's case is the Bahamas (G.B. Br. 20). However, this is a diversity case. In diversity cases, Rule 17(b) has been interpreted as requiring application of the law of the forum on the issue of

capacity to sue (see cases and treatise cited in Asiatic's main brief at 19).* Thus, in this case, Rule 17(b) requires the District Court to apply New York State law and therefore BCL § 1312, on the issue of capacity to sue.

B. BCL § 1312 should be applied on the question of capacity to sue, despite the presence of federal substantive law created by the Federal Arbitration Act. Grand Bahama's next argument is that the Arbitration Act sets forth a complete body of substantive law and leaves no room for application of any state law, citing this Court's opinion in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), cert. denied, 364 U.S. 801 (1960) (G.B. Br. 20-27). What Grand Bahama fails to face up to is that this body of substantive law is not all encompassing and does not preempt the field of arbitration and proceedings relating thereto.

The substantive law under the Arbitration Act relates only to questions concerning the validity and interpretation of arbitration agreements, El Hoss Eng. & Transp. Co., Ltd. v. Am. Independent Oil Co., 289 F.2d 346, 347 (2d Cir.), cert. denied, 368 U.S. 837 (1961). Thus, with respect

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* Grand Bahama concedes as much, albeit in a backhanded fashion, when it states that the law of the state of the incorporation governs the question of capacity "at least where federal law is in issue" (G.B. Br. 20).

to the underlying dispute on the merits of this litigation, federal law applies and either the federal or state court may apply that law.

The question before this Court, however, does not relate to the merits of this litigation, but instead to the capacity of Grand Bahama to maintain any litigation in New York State regardless of the subject matter of such litigation. Since this is a diversity case,* this question is not governed by the substantive law under the Arbitration Act, but instead is controlled by state law.**

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* Indeed, even if this were a federal question case, which it is not, state law would control the question of the capacity of the plaintiff to maintain the action. Thus, in Anglo Am. Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903), a state door-closing statute was applied to defeat a claim based on constitutionally guaranteed rights (i.e., the full faith and credit clause). In R. V. McGinnis Theatres & Pay T.V. Inc. v. Video Independent Theatres, 386 F.2d 592 (10th Cir. 1967), cert. denied, 390 U.S. 1014 (1968), a state door-closing statute was applied in an antitrust case and in Brody v. Chemical Bank, 482 F.2d 1111, 1114 (1973), state law on capacity to sue was applied to a securities case. A fortiori, there is no reason why state law should not be applied on the issue of capacity to sue in a case commenced under the Arbitration Act.

** It should be noted that split choices of law (i.e., applying the law of different jurisdictions to different issues in the same case) have long been the rule in situations involving conflict of laws. In such cases, the courts apply the law of the jurisdiction with the greatest interest in having its law applied to the particular issue in question. See generally Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Intercontinental Planning Ltd. v. Daystrom Inc., 24 N.Y.2d 374, 248 N.E.2d 576 (1969); George v. Douglas Aircraft, 332 F.2d 73 (2d Cir. 1964); Sach v. Now, 478 F.2d 360 (2d Cir. 1973). In this instance, federal substantive law should be

The main case cited by Grand Bahama, Holmberg v. Armbrecht, 327 U.S. 392 (1946), is a federal securities case in which the court applied federal substantive law, rather than state substantive law on the issue of statute of limitations.

This case, therefore, is inapposite. In the first place, the Securities Act, unlike the Arbitration Act, sets forth its own independent basis for jurisdiction. Secondly, the question which was litigated in Holmberg related to the dispute on the merits and involved a conflict between federal and state law on that question. Here, the question presented is the threshold question of capacity to maintain an action. Even in securities cases like Holmberg, that question is governed by state law (Rule 17(b)), and since this is a diversity case, it is New York State law which applies to this case.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1960), and A/S J. Ludwig Mowinckels Rederi v. Dow Chemicals Co., 25 N.Y.2d 576, 255 N.E.2d 774 (1970), are similar to Holmberg and are equally inapposite. They are both cases in which the court chose to apply federal substantive law on the underlying dispute on the merits in a situation where there was a conflict between federal and state law.

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applied to questions concerning the validity and interpretation of the contract in dispute (where the Arbitration Act expresses a strong federal interest) and New York State law should be applied to the threshold question of access to the courts (where New York State has a strong public policy to protect). This is especially true since nothing in the Arbitration Act conflicts with New York's public policy.

C. A New York State court would, and constitutionally could, close its door to this action. Grand Bahama also argues that New York State would voluntarily refrain from applying BCL § 1312, structuring that argument around two cases, Terminal Auxiliar Maritima v. Cocotos Steamship Co., 11 Misc. 2d 697, 178 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1957), and Tugee Laces, Inc. v. Mary Muffet, Inc., 297 N.Y. 914, 79 N.E.2d 744 (1948). Both of these cases held that a special proceeding to compel arbitration was not barred by BCL § 1312. However, at the time these cases were decided, BCL § 1312 applied only to "actions", and in New York State there were sharp distinctions between "actions" and "special proceedings". Since then, New York CPLR § 103 abolished these distinctions. More importantly, the BCL itself was amended to include special proceedings within its purview. Thus, the problem faced by the cases was rectified by the statute and the issue has never arisen again (As. Br. 6, n.).

Next, Grand Bahama argues that the New York state courts would refrain from applying BCL § 1312, because this is an action in interstate commerce. The most glaring shortcoming of this argument is that it renders BCL § 1312 virtually useless. Since BCL § 1312 applies only to foreign corporations doing business in New York without being qualified to do so, it is obvious that the business done, for the most part, would

be in interstate commerce. If New York were to refrain from applying BCL § 1312 in such instances, foreign corporations would obtain a significant competitive advantage over domestic ones, further encouraging businesses to leave New York.

As previously stated, there is absolutely no case where a foreign corporation was found to be doing business in New York within the meaning of BCL § 1312, and in which the New York courts refused to apply that statute (As. Br. 8).*

Grand Bahama finally argues that if New York state courts were to apply BCL § 1312 to this transaction, it would be unconstitutional (G.B. Br. 38). This matter was dealt with in Asiatic's main brief at pages 8-11. Grand Bahama's argument is based on a misreading of Allenberg Cotton Co. Inc. v. Pittman, 419 U.S. 20 (1974), wherein the Supreme Court held that a door-closing statute could not be applied to an action based on a contract in interstate commerce unless the local activities in the forum were substantial, 419 U.S. at 33. Here, Asiatic contends that Grand Bahama's activities in New

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* The cases cited by Grand Bahama on page 41 of its brief are generally cases which relate to whether or not a company is doing business in New York State for purposes of in personam jurisdiction and as such have absolutely no bearing to any issue on this appeal. One case, Opticians Ass'n. v. Guild of Prescription Opticians, 44 App. Div. 2d 370, 374 N.Y.S.2d 451 (3rd Dep't. 1975), deals with § 1313(a) of the Not-For-Profit Corporation Law. As such, it too has no bearing on this case. Moreover, Opticians Ass'n. held only that the foreign corporation's activities in New York were insufficient to bring into play § 1313(a) of the N-PCL.

York are more than sufficient to satisfy the Allenberg test and thus, application of BCL § 1312 raises no constitutional difficulties.

POINT II

THE CONVENTION OF 1958 IS IRRELEVANT TO THIS APPEAL AND, IN ANY EVENT, WOULD NOT BE APPLICABLE TO THIS CASE.

For the first time on this appeal, Grand Bahama argues that federal question jurisdiction exists in this case based on the Convention of 1958 (9 U.S.C. § 200 et seq.). Grand Bahama then goes on to suggest that BCL § 1312 is irrelevant in federal question cases (G.B. Br. 30-38). The Convention (unlike the Federal Arbitration Act, which Grand Bahama has heretofore relied on) contains a provision conferring jurisdiction on the federal courts.

Grand Bahama did not make this argument in the District Court, or on the 1292(b) application to this Court. Indeed, it has always conceded that the sole basis for jurisdiction in this case was diversity of citizenship (App. 3a, ¶ 3). Since this is a 1292(b) appeal which is limited to the question certified to this Court by the District Court, the effect of the Convention, if any, is a matter upon which the District Court should pass before Grand Bahama obtains appellate review of the issue.

In any event, the Convention by its very terms is

inapplicable to this situation. Grand Bahama concedes that the Bahamas is not a party to the Convention (G.B. Br. 30).* For this reason, nationals of the Bahamas are not entitled to avail themselves of the privileges the Convention offers. 9 U.S.C. § 201 (Article XIV of the Convention).** 87 C.J.S. Treaties § 1 (1954) citing Charlton v. Kelly, 229 U.S. 447 (1913); see also Splosna Plevba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368, 1371 (S.D.N.Y. 1974). Furthermore, the delegates to the Convention expressly stated in the floor debates that only the courts of signatory countries are required to compel arbitration. G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, 24-28 (1958).

The cases which Grand Bahama cites, Sherk v. Alberto

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* Grand Bahama states that Great Britain is a party to the Convention, a fact which is totally irrelevant. Great Britain did not ratify on behalf of other commonwealth nations, nor could it have. Where such nations wished to be a party to the Convention (e.g., Australia), they have independently ratified it. See U.S. Dept. of State, Treaties in Force, 315 (1976).

** Article XIV of the Convention provides that "a Contracting State shall not be entitled to avail itself of the present convention against any other Contract States except to the extent that it is itself bound to apply the Convention" (emphasis added). If nationals of a contracting state are limited in their enforcement of the Convention to the extent that their nation is itself bound, then a fortiori, nationals of a non-contracting state cannot assert the provisions of the Convention against nationals of a contracting state.

Culver, 417 U.S. 506 (1973); and McCreary Tire & Rubber Co. v. Ceat, 501 F.2d 1032 (3d Cir. 1974); and Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y.), aff'd, 489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974), all involved nationals of foreign countries who had ratified the Convention.

Conclusion

For the foregoing reasons, the federal court should respect the state's door-closing policy in this matter, and the order appealed from should be reversed.

Dated: August 19, 1976

Respectfully submitted,

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STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.:

RALPH M. DIONNE, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to this action and resides at 64-42 84th Street, Rego Park, New York 11374.

That on the 19th day of August 1976, deponent served the annexed Reply Brief for Respondent-Appellant Asiatic Petroleum Corporation upon Messrs. Eaton, Van Winkle & Greenspoon, Attorneys for Petitioner-Appellee, at their offices located at 600 Third Avenue, New York, N. Y. 10016, by depositing two (2) true copies thereof securely enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Ralph M. Dionne

Ralph M. Dionne

Sworn to before me this
19th day of August 1976

Murray Cohen

Notary Public

MURRAY COHEN
NOTARY PUBLIC, State of New York
No. 41-5745406
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1978